

Lawrence J. Gornick (SBN 136290)  
Debra DeCarli (SBN 237642)  
**LEVIN SIMES KAISER & GORNICK LLP**  
44 Montgomery Street, 36<sup>th</sup> Floor  
San Francisco, CA 94104  
Telephone: (415) 646-7160  
Fax: (415) 981-1270  
[lgornick@lskg-law.com](mailto:lgornick@lskg-law.com)  
[ddecarli@lskg-law.com](mailto:ddecarli@lskg-law.com)

Bruce W. Blakely (SBN 106832)  
**FLAXMAN & BLAKELY, AN ASSOCIATION**  
591 Redwood Highway, Suite 2275  
Mill Valley, CA 94941  
Telephone: (415) 381-6650  
Fax: (415) 381-4301  
[bruce@brucewblakely.com](mailto:bruce@brucewblakely.com)

Attorneys for Plaintiffs

**UNITED STATES DISTRICT COURT**  
**NORTHERN DISTRICT OF CALIFORNIA**

PETER JAY GERBER AND MIRIAM  
GOLDBERG,

Plaintiffs,

vs.

BAYER CORPORATION AND BAYER  
HEALTHCARE PHARMACEUTICALS,  
INC.; BMC DIAGNOSTICS, INC.;  
CALIFORNIA PACIFIC MEDICAL  
CENTER; GENERAL ELECTRIC  
COMPANY; GE HEALTHCARE, INC.; GE  
HEALTHCARE BIO-SCIENCES CORP.;  
McKESSON CORPORATION; MERRY X-  
RAY CHEMICAL CORP.; and DOES 1  
through 35

Defendants.

Case No: 3:07-cv-05918-JSW

**PLAINTIFFS' OPPOSITION TO  
DEFENDANTS' MOTION TO STAY ALL  
PROCEEDINGS PENDING TRANSFER TO  
MDL**

Date: January 11, 2008  
Time: 9:00 a.m.  
Courtroom: 2

Plaintiffs file this opposition to Defendants' Motion simultaneously with their Motion for Remand. Plaintiffs request that their Motion for Remand be considered before considering Defendants' Motion to Stay. Should the Court grant Plaintiffs' Motion for Remand, Defendants'

1 Motion to Stay will be rendered moot. In the event that the Court hears Defendants' Motion to Stay  
 2 first, it should be denied because:

- 3 • **The MDL to which Defendants' wish to transfer this case has not been formed;**
- 4 • **The significant delay involved in a transfer to the MDL would greatly prejudice**  
 5 **Plaintiff; and**
- 6 • **Issues and parties unique to this case would not be efficiently litigated in an MDL.**

### 7 **BACKGROUND**

8  
 9 Mr. Gerber suffers from Nephrogenic Systemic Fibrosis, an incurable, painful and life-  
 10 threatening disease. He developed the disease as a direct result of receiving MRIs and MRAs using  
 11 injections of gadolinium based contrast agents. The agents were manufactured by Defendants Bayer  
 12 Corporation and Bayer Healthcare Pharmaceuticals, Inc. (jointly referred to as "Bayer") and General  
 13 Electric Company, GE Healthcare, Inc. and GE Healthcare Bio-Sciences Corp. (collectively referred to  
 14 as "GE") and used in conjunction with machinery manufactured by GE. The agents were distributed  
 15 by McKesson Corporation and Merry X-Ray Chemical Corp., and administered by California Pacific  
 16 Medical Center and BMC Diagnostics, Inc.

17 Plaintiffs filed this matter in San Francisco Superior Court on October 26, 2007 against four in-  
 18 state defendants (McKesson, Merry X-Ray, California Pacific Medical Center and BMC Diagnostics)  
 19 and five out-of-state defendants (The GE and Bayer entities). This case was removed by out-of-state  
 20 defendants Bayer and GE ("Removing Defendants"). Removing Defendants allege in their removal  
 21 that the four in-state defendants are fraudulently-joined defendants whose non-diverse California  
 22 residencies should be ignored for purposes of determining diversity jurisdiction.

23 Simultaneous with filing their removal, Defendants GE and Bayer filed identical Motions to  
 24 Stay All Proceedings Pending Transfer Decision by the Judicial Panel on Multidistrict Litigation  
 25 ("JPML").

26 A motion to transfer all federal products liability actions involving gadolinium based contrast  
 27 dyes to the Southern District of Ohio was filed with the Judicial Panel on Multidistrict Litigation  
 28 ("JPML") on October 26, 2007. See Exhibit A to Defendants' Motion.

1 The JPML has not yet set a hearing date. See Declaration of Debra DeCarli.

2 Plaintiffs filed their Motion for Remand simultaneously with this Response in Opposition to  
3 G.E.'s and Bayer's identical Motions to Stay.

#### 4 LEGAL ANALYSIS

5 Courts in the Northern District of California have adopted a three-step methodology for  
6 addressing competing motions for remand and stay:

- 7 1. First, the court should give preliminary scrutiny to the motion to remand, promptly  
8 completing its consideration and remanding the case if removal was improper.
- 9 2. Second, if the jurisdictional issue appears factually or legally difficult, the court  
10 should determine whether identical or similar jurisdictional issues have been raised  
11 in other cases that have been or may be transferred to the MDL.
- 12 3. Finally, and only if the second inquiry is reached and answered affirmatively, the  
13 court should consider staying the action, weighing the following factors: a) interests  
14 of judicial economy; b) hardship and inequity to the moving party if the action is  
15 not stayed; c) potential prejudice to the non-moving party.

16 *See Conroy v. Fresh Del Monte Produce Inc.*, 325 F. Supp. 2d 1049, 1053 (N.D. Cal. 2004); *Strong v.*  
17 *Merck & Co.*, 2005 U.S. Dist. LEXIS 2413, at 7 (N.D. Cal. 2005); *Edsall v. Merck & Co.*, 2005 U.S.  
18 Dist. LEXIS 42408, at 8 (N.D. Cal. 2005).

19 If this Court grants Plaintiffs' remand, Removing Defendants' Motion to Stay is Moot. Only if  
20 the Court has first determined that the jurisdictional issues are legally or factually difficult, and has  
21 further determined that those issues are common to others in the MDL, should the Court then consider  
22 a stay pending transfer. The following factors are then weighed: a) interests of judicial economy; b)  
23 hardship and inequity to the moving party if the action is not stayed; c) potential prejudice to the non-  
24 moving party.

#### 25 **A. Issues and parties unique to this case would not be efficiently litigated 26 in an MDL**

27 Removing Defendants have requested a stay pending a transfer to an MDL. But, the JPML has  
28 not created an MDL for gadolinium litigation, nor even scheduled a hearing to consider creating one.

Further, no other case in any prospective gadolinium MDL will address the question of whether, under California law, it is possible for Plaintiffs to assert negligence, CLRA and warranty claims against California Pacific Medical Center and BMC Diagnostics, Inc. Those issues are specific to this case. There has been no showing that identical or similar issues have been raised in other cases that might be transferred to the MDL. “Where case-specific issues of fact or law are raised by a motion to remand and a defendant has clearly failed to meet the substantive or procedural requirements for removing a state court action, ‘the court should promptly complete its consideration and remand the case to state court.’” *Edsall v. Merck & Co.*, 2005 U.S. Dist. LEXIS 42408 (N.D. Cal. 2005) (citations omitted.).

### **B. Stay and Transfer Results in Prejudice to Plaintiffs**

Mr. Gerber is seventy-two years old and suffers from a progressive and incurable disease. If Plaintiffs’ case is remanded to San Francisco Superior Court, they will have the right to a preferential trial setting within 120 days. Cal.Code.Civ.Proc. § 36. If this Court stays Plaintiffs’ case pending transfer to an MDL which is not yet in existence and is unlikely to be created for several months, Plaintiffs will suffer months of delays just waiting for the transfer to occur. Then, once the case transferred to an MDL, it is likely that it would take at least several additional months for the new MDL motion to hear and decide Plaintiffs’ remand motion. The practical effect of Removing Defendants’ delay tactic is, at a minimum, a four to six month delay, and possibly longer.

### **C. Stay and Transfer Results in Inefficiency**

A stay and transfer to the prospective but not yet formed gadolinium MDL is no doubt the most convenient result for Removing Defendants. However, Removing Defendants are not the only defendants in this case. A stay would result only in a transfer of Plaintiffs’ claims against Removing Defendants, while Plaintiffs’ remaining claims against McKesson, Merry X-Ray, California Pacific Medical Center and BMC Diagnostics would be simultaneously separated and remanded for disposition in this Court. Plaintiffs’ claims against the different defendants would be split, requiring them to prosecute a single lawsuit in multiple jurisdictions at the same time. This would result in severe prejudice to Plaintiffs, and is hardly an efficient use of judicial resources. By contrast, there is a forum in which Plaintiffs may litigate claims against all defendants, in one place, from initial

pleading through trial. More importantly, it is a court with subject matter jurisdiction over the action:  
San Francisco Superior Court.

**CONCLUSION**

In considering the competing motions for remand and for stay, the answer to each of the Court's inquiries militates against stay and in favor of immediate remand.

Dated: December 3, 2007

LEVIN SIMES KAISER & GORNICK LLP

By: s/ Debra DeCarli  
Debra DeCarli, Esq.